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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ERIC STILLER AND JOSEPH MORO, on  
behalf of themselves individually and all  
others similarly situated,

Plaintiffs,  
vs.  
COSTCO WHOLESALE CORPORATION  
and DOES 1 through 25, inclusive,

Defendants.

) Case No.: 09CV2473-GPC-BGS

)

) **MEMORANDUM IN SUPPORT OF**

) **MOTION TO (1) CLARIFY ORDER**

) **GRANTING STAY AND (2) EQUITABLY**

) **TOLL STATUTE OF LIMITATIONS FOR**

) **60 DAYS IN THE EVENT THE**

) **DECERTIFICATION ORDER IS**

) **SUSTAINED**

)

) Date: October 3, 2014

) Time: 1:30 p.m.

) Courtroom: 2D

) Judge: Hon. Gonzalo P. Curiel

)

)

**MEMORANDUM IN SUPPORT OF MOTION TO (1) CLARIFY ORDER  
GRANTING STAY AND (2) EQUITABLY TOLL STATUTE OF LIMITATIONS FOR  
60 DAYS IN THE EVENT THE DECERTIFICATION ORDER IS SUSTAINED**

## I. INTRODUCTION

Plaintiffs move the Court to clarify that its May 12, 2014 Stay Order, Doc. 231, stays the effect of its Decertification Order, Doc. 224, in its entirety, including that it does not restart the running of the statute of limitations for class and collective action members' state and federal wage and hour claims and, instead, that tolling of the statutes of limitations for the class and collective action members' claims continues through resolution of Plaintiffs' Rule 23(f) petition and any appeal. Plaintiffs also request that the statutes of limitations be tolled for an additional 60 days in the event that the Court of Appeals either denies Plaintiffs' Rule 23(f) petition or affirms the Decertification Order after taking and hearing an appeal.

Continued tolling properly effectuates this Court's Order staying *all proceedings*, as the avoidance of potentially needless litigation and maintainence of the status quo were primary

1 bases for the Parties' Joint Motion to Stay Proceedings. *See* Doc. 229-1, at 3:22-5:3 and nn. 2,  
 2 4.<sup>1</sup>

3 Continued tolling is within the Court's discretion and authority and will serve the  
 4 interests of judicial efficiency and fairness. Tolling will prevent the potentially needless  
 5 multiplicity of litigation that would arise from class and collective action members filing  
 6 individual complaints to preserve their individual claims. It will also prevent irreparable injury  
 7 to individuals who might lose their claims by failing to file individual suits during the pendency  
 8 of the stay. Further, in the event that the decertification order remains intact, equitable tolling  
 9 of state and federal law claims is in the interest of justice, in that it would allow individual class  
 10 members to pursue their individual claims within a reasonable time and thus avoid prejudice.

11 If the Court does not clarify that its Stay Order includes continued tolling, Plaintiffs  
 12 request, in the alternative, that the Court consider providing notice of the Decertification Order  
 13 to the California class and FLSA collective action members. To this end, Plaintiffs propose  
 14 that the Court direct the Parties to meet and confer regarding the methods and contents of such  
 15 notice and submit proposed notice to the Court for approval within fourteen (14) days.  
 16 Directing notice to absent class and collective action members would serve the interests of  
 17 justice by advising individuals of their right to file their own cases and the relevant statutes of  
 18 limitations, thereby avoiding prejudice.

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22 <sup>1</sup> Courts have found that entry of a stay necessarily continues tolling during the pendency of a Rule 23(f) petition,  
 23 *see Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 450 (S.D.N.Y. 2010) ("In light of the Court's decision to  
 24 stay the final effect of the August 6 Order, any specification that tolling applies to the same extent it did before  
 25 entry of that Order would at best amount to a tautology...."), or that tolling continues during the pendency of a  
 26 Rule 23(f) petition, *Arpon v. UPS*, No. CV 08-08085, 2009 U.S. Dist. LEXIS 38627 (C.D. Cal. Mar. 9, 2009)  
 27 (finding statute of limitations tolled for member of decertified class until Ninth Circuit declined to take  
 28 interlocutory review of decertification order). However, there is also precedent suggesting that a stay order must  
 specify if tolling is to apply. *See Manual for Complex Litigation* §21.28 (4th ed. 2004) (stating that a stay of an  
 order denying class certification *may* continue to toll the statute of limitations) (emphasis added); *Armstrong v.  
 Martin Marietta Corp.*, 138 F.3d 1374, 1389 n.35 (11th Cir. 1998) (stay of a district court's order denying  
 certification alone would not toll the limitations period). In an abundance of caution and to avoid any uncertainty  
 that might arise from ambiguity in the Stay Order, Plaintiffs' counsel contacted Defendant's counsel on this  
 subject. Counsel met and conferred over a period of weeks, with Defendant ultimately taking a different view of  
 the Stay Order. Accordingly, Defendant has indicated that it will oppose this Motion.

1           **II. FACTUAL AND PROCEDURAL BACKGROUND**

2           The Court granted certification of a California Rule 23 class and conditional  
 3 certification of a nationwide FLSA collective action on December 13, 2010. Doc. 104. Notice  
 4 was subsequently issued to all potential California class action members, who were provided an  
 5 opportunity to opt out of the suit, and to FLSA collective action members, who were provided  
 6 an opportunity to opt in to the suit. Doc. 113. After further discovery, Costco moved to  
 7 decertify the class and collective actions on April 13, 2012. Doc. 146. On April 15, 2014, the  
 8 Court granted Costco's motion, Doc. 224, after which Plaintiffs filed a petition for permission  
 9 to appeal the Decertification Order pursuant to Rule 23(f) on April 29, 2014.

10          On May 9, 2014, the Parties filed a Joint Motion to Stay Proceedings pending the  
 11 resolution of Plaintiffs' Rule 23(f) petition. Doc. 229 ("Joint Motion to Stay"). On May 12,  
 12 2014, this Court granted the Motion, staying the action "pending appellate resolution of (1)  
 13 Plaintiffs' petition, pursuant to Federal Rules of Appellate Procedure Rule 5 and Federal Rules  
 14 of Civil Procedure Rule 23(f), for permission to appeal this Court's April 15, 2014 class and  
 15 collective action decertification orders, and, (2) should the petition be granted, pending the  
 16 Ninth Circuit's resolution of Plaintiffs' appeal." Doc. 231 at 2.

17           **III. TOLLING IS APPROPRIATE DURING A STAY PENDING 23(F) PETITION**

18          This Court has authority to clarify its order staying the action to continue tolling of the  
 19 statute of limitations pending the resolution of Plaintiffs' 23(f) petition. Indeed, this was  
 20 implicit in the Court's Order granting the Parties' Joint Motion to Stay. Nevertheless, the  
 21 Court should clarify its Stay Order to continue tolling in order to avoid the onslaught of new  
 22 litigation that would ensue if class and collective action members had to file individual actions  
 23 to preserve their claims, and to prevent the injury to those members who may suffer the loss of  
 24 their claims by failing to do so promptly.

25           **(a) The Court Has Authority to Grant Tolling to Rule 23 Class and FLSA  
 26           Collective Action Members**

27          It is well within this Court's power to provide for continued tolling of the statute of  
 28 limitations for class and collective action members' claims during the pendency of the stay.

1 Following an order decertifying a Rule 23 class, *American Pipe*<sup>2</sup> tolling may be continued  
 2 during the pendency of the plaintiffs' 23(f) petition. *See, e.g., Monahan v. City of Wilmington,*  
 3 No. Civ.A. 00-505, 2004 U.S. Dist. LEXIS 1322, at \*7-8 (D. Del. Jan. 30, 2004) (applicable  
 4 limitations periods were tolled while proceedings were stayed pending interlocutory appeal of  
 5 denial of class certification); *The National Asbestos Workers Medical Fund v. Philip Morris,*  
 6 Inc., No. 98 CV 1492, 2000 U.S. Dist. LEXIS 13910, at \*7-8 (E.D.N.Y. Sept. 26, 2000) ("The  
 7 statute of limitations period should be tolled after class certification is denied pending a Rule  
 8 23(f) appeal to encourage the putative class members to continue to rely on the action's tolling  
 9 until the court of appeals has spoken"); *Manual for Complex Litigation* § 21.28 (4th ed. 2004)  
 10 ("A stay of an order denying certification may continue to toll the statute of limitations and  
 11 thereby discourage the filing of individual cases that might otherwise follow denial of class  
 12 certification."). *See also Arpon v. UPS*, No. CV 08-08085, 2009 U.S. Dist. LEXIS 38627 (C.D.  
 13 Cal. Mar. 9, 2009) (finding statute of limitations tolled until Ninth Circuit declined to take  
 14 appeal of decertification order).

15 This Court also has the authority to grant tolling of the statute of limitations for FLSA  
 16 claims during a stay. *See, e.g., Cilluffo v. Cent. Refrigerated Servs.*, EDCV 12-00886 VAP,  
 17 2012 U.S. Dist. LEXIS 188642, at \*8 (C.D. Cal. Nov. 8, 2012) (tolling statute of limitations for  
 18 FLSA opt-in plaintiffs until a stay was lifted); *Koval v. Pac. Bell Tel. Co.*, No. C 12-1627, 2012  
 19 U.S. Dist. LEXIS 113196, at \*20 (N.D. Cal. Aug. 10, 2012) (tolling FLSA statute of limitations  
 20 for putative collective action members from the date on which a federal action was filed  
 21 through the date on which a stay was lifted); *Castle v. Wells Fargo Fin., Inc.*, No. C 06-4347,  
 22 2007 U.S. Dist. LEXIS 31206, at \*3-4 (N.D. Cal. Apr. 10, 2007) (tolling statute of limitations  
 23 for FLSA opt-in plaintiffs until a stay was lifted).

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 26 <sup>2</sup> In *American Pipe & Construction Co. v. Utah*, the Supreme Court held that "the commencement of a class action  
 27 suspends the applicable statute of limitations as to all asserted members of the class who would have been parties  
 28 had the suit been permitted to continue as a class action." 414 U.S. 538, 554 (1974). The Court reasoned that if the  
 statute of limitations were not tolled, class members would be induced to file motions to intervene or join in order  
 to protect themselves against the certification denial, which would fail to promote efficiency and economy of  
 litigation.

**(b) Continued Tolling Is Consistent with the Parties' Joint Motion to Stay and the Court's Stay Order.**

Continued tolling pending resolution of the Rule 23(f) petition and any appeal is consistent with the bases for and result intended by the Parties' Joint Motion to Stay, which the Court granted. The Joint Motion to Stay identified eliminating the possibility of unnecessary or duplicative litigation as a factor which warranted a stay of the proceedings. *See Doc.* 229 at 4. If tolling were not continued, the status quo would not be maintained and further proceedings would result, including a potential flood of individual actions under state and federal law that would unnecessarily burden the system prematurely. *Id.* at 3. Further, the Joint Motion to Stay explicitly envisioned that individual claims would be considered after resolution of the interlocutory appeal. *See id.* at 5 ("If the Ninth Circuit agrees with Costco . . . then the parties can discuss resolution of the individual claims or proceed through short trials . . ."). If the limitations periods were not tolled, this Court would have to address how to handle the individual claims of members of the California and FLSA class prior to resolution of the interlocutory appeal.

Additionally, because class and collective action members were given notice of the certification decision and because the Joint Motion to Stay—which was approved by the Court—envisioned handling individual claims after resolution of the Rule 23(f) petition and appeal, individual class and collective action members reasonably may have refrained from filing separate suits. An order clarifying that the Stay Order continues tolling is appropriate to make clear that class and collective action members need not initiate individual litigation pending resolution of the Rule 23(f) petition or appeal. Were the Court to withhold continued tolling, as explained below, the Court must consider providing notice of the decertification order to class and collective action members in order to advise them of their rights and the need to promptly file any separate actions.

**(c) Tolling Should Be Continued to Preserve Judicial Resources and Prevent Prejudice to Decertified Class and Collective Action Members.**

Tolling of the statute of limitations will also serve the interests of judicial economy and avoid unfair prejudice to members of the decertified actions. Absent tolling, thousands of decertified California class and FLSA collective action members would need to promptly bring suit to preserve their individual claims. If, thereafter, an interlocutory appeal were to reverse or vacate the decertification order, the Parties and litigation would have been needlessly thrown into disarray, and judicial and Party resources would have been misspent on premature filings. The Court should clarify that the statute of limitations is tolled in order to prevent the disruption of the judicial system and expenditure of resources on what, at this point, would be needless individual actions by class and collective action members filed during the pendency of the Rule 23(f) petition or appeal. *See Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 448 (S.D.N.Y. 2010) (the prospect of unnecessary, duplicative litigation warranted a stay that continued tolling of the statute of limitations); *Nat'l Asbestos*, 2000 U.S. Dist. LEXIS 13910, at \*5 (stay providing for tolling of the statute of limitations pending Rule 23(f) appeal “[t]o ensure that members of the class and defendants as well as the courts are not unnecessarily burdened by individual suits to protect statute of limitations tolling rights prior to the appellate decision.”).

Tolling also should be continued in order to prevent prejudice to class and collective action members. Because class and collective action members may have relied on the prior class certification notice or the stay of proceedings, there is a substantial risk they may inadvertently allow their claims to expire. Continued tolling is appropriate to prevent such harm. *See Jock*, 738 F. Supp. 2d at 448 (entry of a stay that continued tolling was justified because “if an individual plaintiff with a meritorious claim did not pursue an individual [proceeding] pending appeal … then she might be deprived of any right to relief regardless of the appeal’s outcome”); *National Asbestos*, 2000 U.S. Dist. LEXIS 13910, at \*8 (tolling the statute of limitations in part to avoid prospect of harm to proposed class members that “potentially viable claims might expire unless new actions were promptly brought”).

1                   **IV. THE COURT SHOULD EQUITABLY TOLL THE STATUTE OF LIMITATIONS**  
 2                   **IN THE EVENT THAT THE DECERTIFICATION ORDER IS FINALLY SUSTAINED**

3                   The Court also has the authority to equitably toll the statute of limitations for a period of  
 4 time following a final order decertifying a class so as to preserve class members' claims and to  
 5 avoid prejudice toward individual plaintiffs. Courts have found such relief appropriate after  
 6 decertification of FLSA collective actions. *See, e.g., Beauperthuy v. 24 Hour Fitness USA,*  
 7 *Inc.*, 772 F. Supp. 2d 1111, 1136 (N.D. Cal. 2011) (relying on equity powers to grant 30 days  
 8 of equitable tolling in order to avoid prejudice toward individual opt-in plaintiffs); *Zivali v.*  
 9 *AT&T Mobility, LLC*, 08 Civ. 10310, 2011 U.S. Dist. LEXIS 101084, at \*25 (S.D.N.Y. June 2,  
 10 2011) (granting 45 days of equitable tolling in order to avoid prejudice toward individual opt-in  
 11 plaintiffs); *Proctor v. Allsups Convenience Stores, Inc.*, 250 F.R.D. 278, 284 (N.D. Tex. 2008)  
 12 (granting 30 days of equitable tolling); *Johnson v. Big Lots Stores, Inc.*, NO. 04-3201, 2008  
 13 U.S. Dist. LEXIS 123265, at \*4-6 (E.D. La. July 24, 2008) (granting 45 days of equitable  
 14 tolling); *Smith v. Heartland Auto. Servs.*, 404 F. Supp. 2d 1144, 1155 (D. Minn. 2005) (staying  
 15 decertification order for 60 days for purposes of equitable tolling). Several courts have taken  
 16 the same approach with respect to decertified Rule 23 classes. *See In re Teflon Products*  
 17 *Liability Litig.*, 254 F.R.D. 354, 371 (S.D. Iowa 2008) ("All statutes of limitations periods are  
 18 tolled for ninety (90) days from the date of this Order to enable individuals . . . in plaintiffs'  
 19 proposed class definitions to file separate complaints in the appropriate federal or state district  
 20 court."); *Barrett v. U.S. Civil Serv. Commission*, 439 F. Supp. 216, 218-19 (D.D.C. 1977)  
 21 (resuming running of the statute of limitations for decertified Rule 23 class members from date  
 22 of receipt of decertification notice rather than date of decertification order).

23                   If, after proceedings before the Court of Appeals, Plaintiffs' claims remain decertified,  
 24 sufficient time must be allowed for class members to assert their rights by filing individual  
 25 claims. Therefore, the Court should clarify in its order that tolling will be continued for 60  
 26 days past either appellate court denial of Plaintiffs' Rule 23(f) petition, or appellate affirmation  
 27 of the Decertification Order for both the Rule 23 class and the FLSA collective action opt-in  
 28 plaintiffs.

1           **V. IN THE ALTERNATIVE, THE COURT SHOULD SHOULD CONSIDER**  
 2           **DIRECTING NOTICE OF DECERTIFICATION TO MEMBERS OF THE**  
 3           **DECERTIFIED CLASS AND COLLECTIVE ACTIONS**

4           If the Court declines to clarify that its Stay Order continues tolling of the statutes of  
 5           limitations, the Court should consider directing notice to all members of the decertified Rule 23  
 6           class and FLSA collective actions. Such notice is appropriate following decertification of a  
 7           class where members have previously received notice of class certification in order to ensure  
 8           that individual claimants who have relied on notice of the action will be able to file separate  
 9           suits as soon as possible, and will not be prejudiced by reliance on the ongoing litigation to  
 10           represent their claims. *See Manual for Complex Litigation* § 21.313 (4th ed. 2004) (“[I]f a  
 11           decision is made to decertify a previously certified class . . . after certification notice has been  
 12           issued and after the time for opting out has expired, the judge should consider whether to  
 13           inform the affected class members of the change in their status and any effect on the statute of  
 14           limitations.”).

15           Federal Rule of Civil Procedure 23(d)(1)(B) allows for courts to issue orders that  
 16           “require—to protect class members and fairly conduct the action—giving appropriate notice to  
 17           some or all class members of . . . any step in the action.” *See also* Fed. R. Civ. P. Rule 23(e)  
 18           (allowing court, in the case of dismissal, to “direct notice in a reasonable manner to all class  
 19           members who would be bound by the proposal”). District courts in this circuit have found that  
 20           class members are entitled to notice after decertification of a Rule 23 class and directed  
 21           plaintiffs’ counsel to prepare notice of decertification orders. *See, e.g., Price v. City of Seattle*,  
 22           C03-1365RSL, 2006 U.S. Dist. LEXIS 71041, at \*22 (W.D. Wash. Sept. 19, 2006) (stating that  
 23           absent class members were entitled to receive notice of decertification, and directing class  
 24           counsel to prepare notice for Court’s approval within 14 days); *Williams v. Boeing Co.*, C98-  
 25           761P, 2005 U.S. Dist. LEXIS 27491, at \*34 (W.D. Wash. Nov. 4, 2005) (finding that notice of  
 26           decertification should be given to class members and directing plaintiffs’ counsel to prepare  
 27           notice within 7 days). *See also Negrete v. Allianz Life Ins. Co. of North America*, 287 F.R.D.  
 28

1 590, 597 (C.D. Cal. 2012) (finding that if a class certification order is modified to exclude class  
2 members, then notice is required).

3 This approach is consistent with circuit court decisions finding that a district court must  
4 ensure that members of a class receive notice upon order of a decertification. See *Culver v.*  
5 *City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002) (holding that district court erred in failing  
6 to notify the class of decertification order under Rule 23(e) after that court decertified a Rule 23  
7 class because decertification was effectively equivalent to dismissal); *Birmingham Steel Corp.*  
8 *v. TVA*, 353 F.3d 1331, 1339 (11th Cir. 2003) (holding that “once a district court has decertified  
9 a [Rule 23] class, it must ensure that notification of this action be sent to the class members, in  
10 order that the latter can be alerted that the statute of limitations has begun to run again on their  
11 individual claims”).

12 Courts also allow or direct the issuance of notice to collective action members  
13 following an order of decertification in an FLSA collective action in order to advise plaintiffs  
14 of their rights and avoid prejudice in asserting individual claims. See, e.g., *Sliger v. Prospect*  
15 *Mortg., LLC*, No. Civ. S-11-465 LKK/EFB, 2012 U.S. Dist. LEXIS 170701, at \*14 (E.D. Cal.  
16 Nov. 29, 2012) (“Any order to decertify the collective action must provide for clear, accurate,  
17 and timely notice to the [FLSA] opt-in plaintiffs of their rights upon decertification.”); *White v.*  
18 *14051 Manchester, Inc.*, No. 4:12-CV-469 JAR, 2014 U.S. Dist. LEXIS 73721, at \*76 (E.D.  
19 Mo. May 30, 2014) (“Plaintiffs’ counsel shall notify the [FLSA] opt-in plaintiffs that the  
20 collective action has been decertified and their FLSA claims are no longer pending before this  
21 Court.”); *Smith v. Heartland*, 404 F. Supp. 2d at 1155, n.9 (clarifying court’s assumption that  
22 plaintiffs’ counsel would provide order of decertification to all opt-in plaintiffs and advise  
23 plaintiffs of their rights in pursuing individual claims against the defendant).

24 An order directing notice of decertification to former Rule 23 class and FLSA collective  
25 action members would serve the interests of justice and fairness. Such notification would  
26 advise plaintiffs of their right to file their own suits and prevent the danger that the statute of  
27 limitations on their claims would run without their knowing until it is too late. Further, it  
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1 would prevent prejudice toward individual plaintiffs who may have justifiably assumed their  
2 interests were represented in the ongoing litigation.

3 If the Court allows the issuance of notice, Plaintiffs propose that the Court order the  
4 Parties to meet and confer on the form and substance of the notice and to submit a proposal  
5 within 14 days.

6 **VI. CONCLUSION**

7 For the reasons set forth above, Plaintiffs respectfully request that the Court issue an  
8 order clarifying that the statutes of limitations are tolled for Rule 23 class and FLSA collective  
9 action members pending resolution of Plaintiffs' Rule 23(f) petition and any subsequent  
10 appellate proceedings. Plaintiffs also request that the order provide that the statutes of  
11 limitations will be tolled for an additional 60 days following either an appellate court denial of  
12 the 23(f) petition or affirmation of this Court's Decertification Order.

13 Should the Court decide that the statutes of limitations will not be tolled, Plaintiffs  
14 request in the alternative that the Court issue an order directing that notice be provided to  
15 members of the decertified class and collective actions. Plaintiffs propose that the Court order  
16 the Parties to meet and confer on the form and substance of the notice and to submit a proposal  
17 within 14 days.

18  
19 DATED: July 10, 2014

/s/ David W. Sanford

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